No. 15208

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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GEORGE J. SCHAEFER,

*Appellant,*

*vs.*

MILTON L. GUNZBURG, *et al.*,

*Appellees.*

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## APPELLANT'S OPENING BRIEF.

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### Introductory Statement.

Plaintiff appeals from a judgment below in favor of defendants, entered after a trial before the court sitting without a jury, the court having previously granted the motion of defendants to strike plaintiff's timely demand for jury trial.

The action below was brought for damages for breach of a contract to share profits. By the terms of that contract, plaintiff's complaint alleged, defendant Milton L. Gunzburg agreed to pay to plaintiff, in return for plaintiff's agreement to render certain specified services, a sum equal to 50% of the profits derived by the various defendants from a family business venture. The com-

plaint further alleged the repudiation by defendants of the agreement and their breach thereof by failure to pay plaintiff his rightful (or any) share of their profits. Because the amount of plaintiff's damages for the aforesaid breach was dependent upon the amount of the profits derived by defendants, the complaint prayed, among other things, for an accounting of such profits and a money judgment in favor of plaintiff for 50% thereof. Plaintiff timely demanded a jury trial.

That an accounting was necessary to determine the amount of defendants' profits and hence, by simple computation therefrom, the amount of plaintiff's damages, did not convert a legal action for damages for breach of contract into an equitable action for an accounting. At most, the action was then one of which law and equity had concurrent jurisdiction, and accordingly one in which plaintiff was entitled to a jury trial as a matter of right upon the issues of the making and breach of the agreement.

But even if the accounting element had imported an equitable feature into the case, that feature was eliminated by the court concurrently with its denial of the jury trial. Upon motion of defendants, the court ordered a separate trial under Rule 42(b) of the Federal Rules of Civil Procedure, limited to the disputed issues of the making, existence, terms and breach of the contract upon which plaintiff sued. The court reserved for a later and separate trial, if necessary, the issues of the amount of defendants' profits and the nature and extent of assets in which plaintiff might have an interest.

By its Order, the court thus struck completely, from the issues to be separately tried, any element of equitable cognizance. It specifically consigned to a separate trial at a later date all issues relating to accounting and other relief prayed for in the complaint. It underscored its separation of the issues into at least two distinct trials (in fact, almost two separate actions) by excluding from the scope of pre-trial discovery, as well as from the separate trial, "evidence relating to an accounting between the parties." Thus left for trial herein were only the factual issues of whether the agreement alleged by plaintiff was in fact made by the parties, the terms thereof, and whether it was breached by defendants.

The issues which were thus specified for trial and thereafter tried were entirely legal in nature, being no different from the same issues presented in any action at law for breach of contract. No issues of accounting or other possibly equitable issues were presented or even permitted by the Order. Nevertheless, and in reference to these legal issues, the court ordered that they be tried without a jury, notwithstanding plaintiff's timely demand therefor. That order, we submit, violated plaintiff's rights under the Seventh Amendment to the United States Constitution and Rule 38(a) of the Federal Rules of Civil Procedure. Since the evidence upon the crucial issues was directly conflicting and clearly sufficient to have sustained a jury verdict for plaintiff, the court's denial of his demand for a jury trial constituted prejudicial and reversible error, as we shall demonstrate.

## Statement of Jurisdiction.

1. The jurisdiction of the Court of Appeals to review the judgment of the District Court is believed to be conferred by Title 28, *United States Code,* Section 1291.

2. The jurisdiction of the District Court herein is believed to be sustained by Title 28, *United States Code,* Section 1332(1).

3. The existence of jurisdiction in the District Court is shown by the allegations of the complaint that plaintiff is a citizen and resident of the State of New York, that the individual and corporate defendants are each and all citizens and residents of the State of California [R. 3-4]; and that the amount in controversy exceeds the sum of $3,000, exclusive of interest and costs [R. 4]. The Findings of Fact are in accord with the jurisdictional allegations of the complaint [R. 101-102].

4. The final judgment from which this appeal is taken was entered on March 28, 1956 [R. 110-111]. Plaintiff served and filed his notice of appeal on April 26, 1956 [R. 111-112].

## Statement of the Case.

### A. The Pleadings.

1. Plaintiff's complaint, entitled "COMPLAINT FOR BREACH OF CONTRACT," alleged that plaintiff was an executive of over forty years' experience in all phases of the motion picture industry, having by reason thereof acquired a wide and extensive knowledge of the operation of the industry, and a valuable reputation for honesty and integrity throughout the entire industry, enjoying close, long-term friendly relations and contacts with most of the key personnel of that industry [R. 4-7]. Defen-

dant Milton L. Gunzburg, having a very limited experience and reputation in the industry, had in late 1950 acquired certain rights to a process for the photography and exhibition of motion pictures giving the three-dimensional illusion of depth, as well as width and height [R. 7-8].

On or about April 20, 1951, Gunzburg and plaintiff entered into an agreement by which plaintiff agreed to render his services in the business aspects of the promotion and development of the aforementioned process and in the marketing thereof and of allied and incidental rights and properties, in return for which Gunzburg agreed to pay to plaintiff one-half of all the profits which should thereafter be received by Gunzburg from the licensing and marketing thereof, it being agreed that a corporation should be formed to promote the process, in which corporation plaintiff and Gunzburg would own equal amounts of the voting stock [R. 8-12]. In many and various respects specified in considerable detail in the complaint, plaintiff kept and performed his promises under the agreement, devoting his services and energies to the promotion and exploitation of Gunzburg's process, in reliance upon the latter's promise to compensate him as alleged [R. 12-17, 34].

The process proved to be a commercial success, Gunzburg entering into licensing contracts with Arch Oboler, Warner Bros. Pictures, Inc., Columbia Pictures Corporation and others for the production of motion pictures by the use of the process, and into a distribution agreement with Polaroid Corporation to sell disposable viewers for use by the audience in viewing such motion pictures, by reason of which contracts Gunzburg and his co-defendants received and derived net profits in amounts unknown to

plaintiff but alleged upon information and belief to be between $6,000,000.00 and $8,000,000.00 [R. 17-25].

Gunzburg breached his contract with plaintiff by appropriating to himself and to his co-defendants, with knowledge of plaintiff's contractual rights, all of the stock of the various corporations formed to receive the profits and proceeds of the business; by repudiating his agreement with plaintiff and denying its existence; and by refusing to pay to him the compensation agreed upon [R. 25-34].

The complaint prayed for a declaration that plaintiff was a partner of Gunzburg in the subject enterprise and entitled to share equally in the profits and proceeds thereof; that defendants be required to account for such profits and proceeds, as to which plaintiff was entitled to 50% thereof, and that he have judgment therefor, with interest; and for damages in the sum of $3,500,000.00, with interest [R. 34-39].

Demand for jury trial was duly endorsed upon the complaint [R. 40].

2. Defendants thereupon noticed a number of motions prior to Answer. Among the motions noticed were: (1) a motion to strike the demand for jury trial upon the ground that "plaintiff's claim is cognizable and remedial in equity" [R. 41]; and (2) motions for separate trial upon the issues as to whether the agreement between plaintiff and Gunzburg, alleged in the complaint, ever existed, and to limit the scope of pre-trial discovery to that issue, all upon the ground that a finding adverse to plaintiff upon that issue would make it "unnecessary to explore the further involved and highly complicated issues of breach, accounting and other matters" [R. 42]. These motions

were supported by the affidavit of defendants' counsel that in their answer, when same was filed, defendants would deny the existence of the agreement alleged in the complaint, and that the allegations relative thereto would be in issue in the action [R. 54-55]. In their Memorandum of Points and Authorities, filed in support of the motions, defendants premised their motion to strike the demand for jury trial upon the ground that the prayer for an accounting made the entire action equitable in nature [R. 45-49].

3. After a hearing upon the motions, the court made its order granting the motion for a separate trial, limited to the issues of the nature of the relationship between plaintiff and Gunzburg, and the existence and nature of the agreement, if any, between them; and limited the scope of discovery before trial to the issues as to which it had ordered the separate trial. It was further ordered that the issues as to which the separate trial had been ordered should be tried before the District Court without a jury, on the ground that, *upon the issues so ordered for such separate trial*, plaintiff "does not have a right to trial by jury" [R. 56-57].

4. Approximately one year later, at the time of the pre-trial hearing herein, plaintiff moved to file an amended complaint on the ground that the filing thereof was "necessary to clarify and simplify the issues herein" [R. 57-58]. The motion was granted and the amended complaint filed March 7, 1955 [R. 66].

5. As indicated, the amended complaint merely clarified and simplified the issues, adding no new issues and changing none, but simply eliminating extensive and detailed evidentiary and conclusionary allegations and correcting dates erroneously set forth in the original complaint.

It was thus alleged that between March 12, 1951 and April 9, 1951, plaintiff and Gunzburg had entered into an oral agreement to participate jointly in the development and commercial exploitation of the three-dimension process, and to share equally in the profits and proceeds therefrom [R. 60-61]. Performance by plaintiff was alleged [R. 61]. Defendants derived substantial amounts of money as profits and proceeds from the development and exploitation of the process, the exact amount whereof being known to defendants but unknown to plaintiff [R. 62-63]. On April 7, 1953, Gunzburg, acting on behalf of himself and his co-defendants, breached said oral agreement by denying its existence and refusing to account to plaintiff for his share of the profits thereof [R. 64].[1]

Since the issues were not altered or modified in any material respect from those presented by the original complaint, as to which issues the District Court had ruled that plaintiff was not entitled to a jury trial, the demand for jury trial was not renewed. Thereafter, at the trial herein, the parties and the court proceeded, under the order for separate trial made upon the original complaint, to try *only* the issues of the existence and nature of the agreement between plaintiff and Gunzburg, the remaining issues as to certain defenses and as to an accounting for profits being reserved to a subsequent trial, if necessary. [R. 133, 154, 447, 1260-1261, 1517.]

6. The Answer of defendants denied substantially all of the allegations of the amended complaint relative to the making, existence, terms and breach of the agreement

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[1]The amended complaint also contained a common count for the reasonable value of services rendered, which is not in issue upon this appeal. [R. 64-65.]

alleged between plaintiff and Gunzburg. [R. 66-69.] Additionally, it alleged certain affirmative defenses and counterclaims, which were not reached by the court in the light of its findings upon the issues specified for the separate trial and are therefore not in issue on this appeal.

**B. The Facts.**

On this appeal, it is not contended that the evidence is insufficient to support the pertinent Findings of Fact or that such Findings of Fact are clearly erroneous. Accordingly, as we conceive the scope of this appeal, it would be neither necessary nor appropriate that we unduly extend the length of this Brief by detailing or summarizing all of the evidence, both in support of and opposed to the allegations of the complaint herein, as we would be required to do were the sufficiency of the evidence an issue upon this appeal.

By the same token, however, we are cognizant of the rule that the erroneous denial of a jury trial is prejudicial and reversible error only if plaintiff presented a factual case which would have been allowed to go to the jury—*i. e.,* that plaintiff must show, from the record, that the evidence would not have permitted the direction of a verdict against him. [*Leimer v. Woods* (8 Cir.), 196 F. 2d 828, 836-837.)

Accordingly, we find it necessary to detail, only in part, the most significant of a wealth of oral and documentary evidence supporting the allegations of the complaint. We do not pretend, however, that the evidence was all in favor of plaintiff below. On the contrary, we readily agree and, in fact, emphatically assert that the evidence below was in substantial conflict. In failing, therefore, to summarize in detail the evidence tending to support

defendants' denials of the agreement alleged in the complaint, we should not be understood as contending that such evidence does not exist, but only that, upon the issues presented by this appeal, that evidence is not material. With that explanation we turn, then, to a brief summary of plaintiff's case upon the evidence.

1. Plaintiff, a man of extensive, varied and productive experience in the motion picture industry [R. 134-136], first met defendant Milton Gunzburg in Los Angeles, California, on March 12, 1951. Gunzburg informed plaintiff that he had a three-dimension process for production and exhibition of motion pictures, which he would like to show to plaintiff. The latter agreed to view certain test footage photographed in the process by Gunzburg. He did so the following day. [R. 138-140.]

2. A day or two later, plaintiff met with Gunzburg in plaintiff's hotel room. Gunzburg stated that he needed the assistance of someone such as plaintiff in "selling" the process to the motion picture industry and exploiting it, but that he had no money to compensate plaintiff for the services which the latter would render. Plaintiff then offered to participate with Gunzburg on a "joint basis" in promoting the process, to which Gunzburg assented. [R. 143-146.]

3. On April 9, 1951, plaintiff and Gunzburg again met, this time in plaintiff's office in New York City. Gunzburg informed plaintiff that he had given approximately half his anticipated profits to others who had participated in the development of the process, having approximately one-half remaining, in which he proposed that he and plaintiff share equally. Plaintiff assented to this proposal. [R. 164-165.] The parties further agreed that plaintiff would handle the business affairs of

the proposed venture and the contacts with industry executives, while Gunzburg would devote himself primarily to the development of the process, each bearing his own expenses in connection therewith. [R. 165-168.]

4. Thereafter, in various manners and respects detailed at length in the extraordinarily voluminous correspondence thereafter ensuing between the parties, plaintiff proceeded with the performance of his obligations under the agreement hereinabove described. He contacted almost every executive of importance in the motion picture industry, striving to interest them in the process. He opened doors for Gunzburg to the offices of men who had declined to see him before his association with plaintiff. He lent his name and reputation to the strengthening of the infant enterprise. He constantly advised Gunzburg, upon the latter's express solicitation and repeated requests, upon every conceivable phase of their operation, including the terms and conditions of the licensing agreement for the production of the world's first three dimension feature-length motion picture. [R. 181-188; Exs. A-E, Z.]

5. Commencing with the release of a motion picture entitled "Bwana Devil," produced in the three-dimension process which plaintiff and Gunzburg had agreed jointly to exploit, in November, 1952, the public and industry interest in and demand for three-dimension motion pictures skyrocketed unbelievably. Contracts licensing the use of the process for unrevealed royalty payments were made by Gunzburg with Warner Bros. and numerous other motion picture producers. Gunzburg was licensed by Polaroid Corporation to sell three-dimension viewers for use by theater audiences in viewing such motion pictures. [R. 1081, 1288-1291, 1390-1393.] There is only

the most scanty and incomplete evidence as to the amount of royalties and profits derived from the foregoing and other contracts and marketing arrangements made with reference to the process, these subjects being foreclosed from inquiry by the court's limitation of the issues for both discovery and trial. It is a reasonable inference, however, that the profits and proceeds were enormous, Gunzburg's profit on the contract with Arch Oboler for the production of "Bwana Devil" *alone* amounting to $270,000.00! [R. 676-677; Deft. Ex. 2 attached to Deposition of Seymour M. Peyser.]

6. By March, 1953, having received neither an accounting of receipts from Gunzburg nor his promised portion of the capital stock of the corporation formed to conduct the business of their enterprise, plaintiff made a number of inquiries and requests of Gunzburg therefor. Through his attorney, on April 7, 1953, Gunzburg denied the existence of any agreement to pay plaintiff anything, and repeated this denial and repudiation of the subject agreement personally to plaintiff on April 9, 1953, whereupon the present action ensued. [R. 196-200.]

7. Gunzburg's version of the conversations giving rise to the agreement sued upon was, of course, widely divergent from that of plaintiff. He admitted meeting plaintiff in Los Angeles on March 12, 1951, and showing him the test footage thereafter, but testified that it was done at plaintiff's solicitation. [R. 1315-1320.] He testified that he was then interested in the production of a motion picture of his own in three-dimension photography, entitled "Sweet Chariot." [R. 1325-1327.] Plaintiff allegedly explained to Gunzburg that, in his then-current occupation and business of functioning as sales representative for independent motion picture producers,

he would be interested in so functioning for Gunzburg in connection with "Sweet Chariot," should Gunzburg produce such a picture, for which service he would be compensated at 3% of the gross receipts. [R. 1327-1330.] There were no other or further conversations between Gunzburg and plaintiff in Los Angeles at this time. [R. 1332.]

According to Gunzburg, he and plaintiff again met on April 11 or 12, 1951, at the latter's office in New York, where again the parties discussed merely plaintiff's business as sales representative for independent producers. [R. 1296-1299.] They met again in plaintiff's office on April 18th or 19th. Plaintiff allegedly told Gunzburg that there was more to the latter's process than he had at first realized, that the problems which he would encounter and the scope of activities which he would have to conduct would be worth more than the customary 3% of the gross receipts on Gunzburg's picture. He pointed out that there were numerous possibilities for production by major motion picture producers licensing the process, and other means for turning the process to account, in relation to all of which plaintiff could render helpful and valuable services. He stated that he did not know what he could do for Gunzburg in respect to these matters, and offered to have Gunzburg judge the value of his services and set the amount of his compensation, based upon results achieved. [R. 1299-1304.] This was the only occasion upon which the subject of plaintiff's compensation for his services was ever discussed by the parties [R. 1305-1306.]

In Gunzburg's view, the foregoing conversations were the only ones in which any understanding was reached regarding plaintiff's services and compensation.

8. It will be seen that the crucial conversations between plaintiff and Gunzburg, out of which their relationship, whatever it was, arose, were had outside the presence of any other persons. As to the truth of their conflicting versions of these conversations, the court was required to make a determination based upon the relative credibility of the two interested party-witnesses.

In addition to plaintiff's testimony, however, a number of disinterested witnesses testified to admissions made by Gunzburg relative to his relationship with plaintiff, which admissions were consistent only with plaintiff's version of their agreement:

a. Bryan Foy, a motion picture producer, produced a motion picture entitled "House of Wax" for Warner Bros., under a licensing contract between the latter and the Gunzburg venture for the use of the three-dimension process. [R. 616.] During production in February, 1953, in a conversation with Gunzburg, the latter informed Foy that plaintiff was Gunzburg's partner in connection with the three-dimension process. [R. 617.]

b. Arch Oboler, an independent motion picture producer, produced "Bwana Devil," the first feature-length motion picture ever produced in the three-dimension process, under a licensing contract with Gunzburg. He first became interested in the possibility thereof in December, 1951, and he first contacted Gunzburg at the latter's home on December 31, 1951. [R. 1077.] On that occasion, Gunzburg informed Oboler that he was not free to discuss a licensing contract with Oboler until he had first cleared the matter with plaintiff, his associate, who had been of great value in the promotion and exploitation of the process. Gunzburg stated that plaintiff was "a part owner of the business." [R. 1078-1080.] On other occasions,

Gunzburg told Oboler that he had given "a very large piece" of the business to plaintiff and that plaintiff had a "large share of stock" in Gunzburg's company. [R. 1083.]

c. Jerry Kay, Oboler's assistant, was present at the meeting with Gunzburg on December 31, 1951 and corroborated Oboler's testimony with reference to Gunzburg's admissions there. [R. 1137-1138.] On a later occasion, Gunzburg informed her that plaintiff was his partner and that he would have to consult with plaintiff before making any decision. [R. 1139-1140.] On another occasion, Mrs. Gunzburg, in Gunzburg's presence, told Miss Kay that Gunzburg had given a "large piece" of the company to plaintiff.

d. Ray Russell Heinze, employed by Gunzburg during much of the period involved here, testified that on a number of occasions Gunzburg referred to plaintiff as his "associate" and as his "partner." [R. 1050.]

e. Elsie Bald, Gunzburg's secretary during much of that period, testified to hearing numerous telephone conversations between Gunzburg and other persons in which Gunzburg described plaintiff as his "partner" and as his "associate." [R. 832-833.]

9. Press releases prepared and supervised by Gunzburg and issued under his direction for general circulation and publication continually referred to plaintiff as "a principal participant in," as "New York head of," and as "associated with" Gunzburg in, the latter's company. [R. 1014-1016, 1040, 1073-1074; Exs. 58-60.] In correspondence between the parties and with third persons, Gunzburg constantly referred to plaintiff as "top echelon" of their business venture, as his "associate," as his "New York associate," and the like. [Exs. A-E.] The correspondence between the parties, contained in five folders

of in excess of 300 separate letters, reflects a constant interchange of views between them as to every conceivable phase of the business of marketing the three-dimension process. [Exs. A-E.]

The foregoing is neither intended nor designed as an exhaustive summary of all of the evidence herein, nor is it claimed that defendants were wholly without any evidence corroborating Gunzburg's testimony. Since we make no claim that, as a matter of law, the evidence is insufficient to support the judgment below, we have limited our summary of that evidence to a brief showing of the substantial evidence offered by plaintiff in support of the allegations of his complaint, which evidence, under a proper mode of trial conformably to plaintiff's jury demand, would have supported a verdict in his favor below.

### C. The Findings and Judgment.

The court found, essentially in conformity with Gunzburg's testimony, that plaintiff and Gunzburg had entered into an oral agreement shortly after March 12, 1951, under and pursuant to which plaintiff would endeavor to aid Gunzburg in attempting to arouse interest in and to secure a market for the latter's three-dimension process; and that if plaintiff succeeded in any of these objectives, he would receive reasonable compensation for his efforts, the amount whereof was to be agreed upon between the parties; but that plaintiff would be entitled to no compensation unless, as a result of his efforts, Gunzburg actually entered into a transaction procured for him by plaintiff. [Find. No. VII; R. 103-104.] Although plaintiff expended time and effort in the performance of this agreement, he did not succeed in his efforts and thereby became entitled to no compensation. [Find. No. XI; R. 105-106.]

No agreement for the joint exploitation or joint ownership of the three-dimension process or for a sharing of the net profits therefrom was ever made between plaintiff and Gunzburg. [Find. Nos. VIII, IX, X; R. 104-105.] Defendants received profits and proceeds from licensing contracts and from the sale of three-dimensional viewers, but none of said defendants was under any contractual obligation to account to plaintiff therefor or to pay to him any monies by reason thereof. [Find. Nos. XII, XIII, XIV, XV; R. 106-108.]

Upon these findings, judgment was entered, dismissing the action on its merits. [R. 111.] The present appeal then ensued.

## Specification of Errors.

1. The District Court erred in striking plaintiff's timely demand for trial by jury, upon defendant's motion therefor, where the complaint alleged the making of a contract to share profits and the breach thereof by defendants, and sought redress therefor under such contract, which issues of fact were properly triable by a jury; plaintiff's right to a jury trial not having been waived by the joinder of requests for some relief of an equitable nature. (Point A, *infra.*)

2. The District Court erred in striking, upon defendant's motion, plaintiff's timely demand for trial by jury as to issues concurrently specified for a separate trial by Court order which excluded from the issues to be separately tried all issues which were of equitable cognizance; leaving to be tried only the issues of the making, terms, performance and breach of an oral contract, which issues of fact were properly triable by a jury. (Point B, *infra.*)

## Summary of Argument.

An action which alleges the making of an agreement to share profits, the performance thereof by plaintiff, and the repudiation and breach thereof by defendants, and which seeks the recovery of plaintiff's contractual share of the profits earned, states a claim upon which relief may be granted in an action at law, and the issues of fact therein presented are properly triable by a jury upon timely demand therefor. (Point A, *infra.*)

Such an action, wherein it is alleged that the contract sued upon created a partnership relation, but that said partnership had been repudiated or terminated by defendants, states a right of action cognizable at law. A partner or joint venturer, where the partnership has been dissolved or terminated, may maintain an action at law against his former partner to recover his aliquot share of assets and profits of the partnership. The fact that plaintiff also seeks relief of an equitable nature in the same complaint or in the same count of his complaint does not deprive him of his right to a seasonably demanded jury trial upon the legal issues. (Point A, 1, *infra.*)

Such an action is not transformed into one solely of equitable cognizance by the fact that defendant must render an account of all of his transactions, or that such an accounting is prayed for in the complaint, in order to ascertain the amount of the judgment to which plaintiff is entitled. That fact may justify the court in ordering that the accounting phases of the action be tried before a master or before the court without a jury, but it does

not alter the legal character of the issues relating to the existence of the duty to account or deprive plaintiff of the right to a jury trial upon those issues. (Point A, 2, *infra.*)

Any danger of confusion or complexity arising from the submission to the jury of a complicated accounting of numerous transactions can be and was here averted by the separation of the issues for trial; trying first the issue of the duty to account, and trying thereafter, in a separate trial, any remaining issues of accounting and assessment of proper division of profits and assets. Having so ordered the separation of the issues for trial and thus excluded from the trial below all issues which might possibly be equitable in character, it was error for the trial court to deny plaintiff a jury trial of the purely legal issues remaining. (Point B, *infra.*)

Where, as here, the evidence below was amply sufficient to support a finding or verdict by a jury in plaintiff's favor upon the issues actually tried below, the erroneous denial of a jury trial thereon was prejudicial to plaintiff and requires reversal of the judgment appealed from. (Point C, *infra.*)

## ARGUMENT.

**In an Action for Damages for Breach of Contract, Plaintiff Is Not Deprived of His Right to a Jury Trial of the Factual Issues Presented, Merely Because His Damages Can Only Be Precisely Computed Upon an Accounting of Defendants' Profits or Because He Also Seeks Some Equitable Relief. In Such an Action, the Failure to Permit a Jury Trial of Issues of Law Upon Timely Demand Is Reversible Error.**

Inquiry into the propriety of the court's Order below, denying plaintiff's timely demand for a jury trial upon the issues actually tried, must necessarily commence with the recognition of certain fundamental principles applicable thereto. Thus, it is axiomatic that a party to an action under the Federal Rules is entitled, as of right upon timely demand therefor, to a jury trial of all issues in such action which would have been triable by a jury at common law.

*Bruckman v. Hollzer* (9 Cir.), 152 F. 2d 730, 732;

*Oklahoma Contracting Co. v. Magnolia Pipe Line Co.* (5 Cir.), 195 F. 2d 391, 396;

*F. R. C. P.,* Rule 38(a).

The joinder in a single action or in a single count of a complaint of requests for legal and equitable relief arising from an operative set of facts does not deprive either party of a right to trial by jury, if seasonably demanded, with respect to those issues of fact which are legal in nature.

*Bruckman v. Hollzer, supra,* 152 F. 2d at 732-733;

*Ring v. Spina* (2 Cir.), 166 F. 2d 546, 550, *cert den.* 335 U. S. 813;

*Leimer v. Woods* (8 Cir.), 196 F. 2d 828, 833.

In a case involving both legal and equitable issues, a demand for jury trial which does not specify particular issues to be tried by the jury must be deemed to be a demand for trial of all issues so triable, and the court must submit all such issues to the jury.

*F. R. C. P.,* Rule 38(b), (c);

*Russell v. Laurel Music Corp.* (S. D. N. Y.), 104 F. Supp. 815, 816.

The parties' entitlement to a jury trial cannot be determined by the characterization of an *action* as equitable or legal and granting or denying a jury trial upon that basis. It is the character of specific *issues,* and not the character of the *action,* which controls the determination; and if the action presents *issues* which are legal in character, a jury trial upon those issues must be accorded the party who timely demands it.

*Reliance Life Ins. Co. v. Everglades Discount Co.* (5 Cir.), 204 F. 2d 937, 942;

*Dickinson v. General Accident etc. Co.* (9 Cir.), 147 F. 2d 396, 397;

*Bendix Avia. Corp. v. Glass* (E. D. Pa.), 81 F. Supp. 645, 646;

*Morrison-Knudsen Co. v. Wiggins* (D. C. Alaska), 13 F. R. D. 304, 305.

". . . there are no longer equity cases and law cases, and it is the issues, not the form of the case, which now determine the method of trial."

*Bendix Avia. Corp. v. Glass, supra.*

To the same effect is the statement of this Court in ruling upon the same question:

> "The right to a jury in the domain or field of equity such as is here involved is determinable *by the issues of fact that are pleaded* in the concrete suit and the type and quality of the remedies that are applicable and available to the suitor." (Emphasis added.)
>
> *Johnson v. Gardner* (9 Cir.), 179 F. 2d 114, 117.

That, judged by these standards, plaintiff's complaint presented issues of fact that were unmistakably legal in character, entitling him to a jury trial of those issues, is demonstrably clear.

**A. In an Action for Breach of Contract to Pay a Percentage of the Profits of a Business, the Issues Relating to the Existence and Breach of the Contract Are Legal in Character, and the Accounting Features Thereof, as an Adjunct to the Determination of Damages, Do Not Convert the Case Into an Action in Equity.**

1. An Action for Breach of Contract to Share Profits Is an Action at Law and Not in Equity, Notwithstanding That an Accounting May Be Required in Order to Ascertain the Amount of Profits and, Consequently, the Amount of Damages to Which Plaintiff Is Entitled.

Plaintiff's complaint herein was, as we have observed, entitled "Complaint for Breach of Contract." Conformably to its title, it pleaded an agreement between plaintiff and Gunzburg by which plaintiff agreed to render his services to Gunzburg in the promotion and exploitation of the latter's business, in return for Gunzburg's promise to pay plaintiff 50% of the profits therefrom; the performance of the agreement by plaintiff; and the breach and

repudiation by defendants, by refusing to pay to plaintiff his agreed compensation.[2] The complaint alleged that the business had earned profits in excess of $6,000,000.00, the exact amount whereof was unknown to plaintiff, of which he was entitled to 50%. It prayed for an accounting of the profits earned and the payment to plaintiff of his rightful share thereof, for a declaration that plaintiff and Gunzburg were partners, and for a division of assets. (Statement of the Case, A, 1, *supra.*)

According to the affidavit of defendants' counsel, filed in support of the motion to strike the demand for jury trial, the disputed issues of fact to be presented below (and which were in fact the only issues tried below) included the factual issues of the making, terms and breach of the agreement alleged. (Statement of the Case, A, 2, *supra.*)

To be sure, the complaint alleged, as conclusions of law from the allegations respecting the agreement between the parties, that plaintiff and Gunzburg were partners, and sought a division of assets and declaration of rights as between partners, as *a part* of the total relief sought. That fact, however, did not make equitable in character the issues of fact presented by the complaint.

In the first place, although the remedies of partners in an existing and continuing copartnership are equitable only, where, as here, a partnership or joint venture

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[2]The propriety of plaintiff's jury demand was, of course, determined upon the issues presented by the original complaint. The amended complaint simply shortened and clarified those allegations and eliminated a number of specific prayers for relief, but did not alter or enlarge the issues presented. There was, accordingly, no cause or justification for renewing a previously stricken jury demand. [*Canister Co. v. National Can Co.* (D. C. Del.), 101 F. Supp. 785, 789.]

has terminated, one partner or co-adventurer may sue the other *in an action at law* for recovery of his rightful share of the profits or losses, upon the other's breach of the partnership agreement.

*Barlin v. Barlin*, 145 A. C. A. 456, 459-460, ..... P. 2d ..... (Oct. 24, 1956);

*Elsbach v. Mulligan*, 58 Cal. App. 2d 345, 369-370, 136 P. 2d 651.

Here the complaint alleged the existence of such a partnership or joint venture and its termination by defendants' breach of the agreement with plaintiff creating the relationship. Upon these allegations, plaintiff sought to recover his share of the profits, a sum which was capable of being computed with certainty from the amount of the profits earned. Under the law of California—which must govern here, this being a diversity case (*Erie R.R. Co. v. Tompkins*, 304 U. S. 64, 79-80)—such an action is one at law, triable by a jury as a matter of right.

But even if it be assumed, for purpose only of argument, that the relief thus sought, premised upon the theory that a partnership was thus created, is cognizable only in equity, still that fact would not justify the denial of a jury trial, since such relief was only a part of the relief sought by plaintiff. And, of course, it is clear that the joinder of such equitable claims with other legal claims, if indeed the claims were equitable, does not defeat plaintiff's right to a jury trial upon the legal issues concurrently presented.

*Bruckman v. Hollzer* (9 Cir.), 152 F. 2d 730, 732-733;

*Ring v. Spina* (2 Cir.), 166 F. 2d 546, 550, *cert. den.* 335 U. S. 813.

Actually, and notwithstanding the conclusions set forth in the complaint, plaintiff's right to recover his share of the profits of the business, as alleged in his complaint, was in no wise dependent upon allegation or proof that the agreement alleged created the legal relationship of partnership or joint venture. The fact that, by agreement, one party renders services to another in exchange for a share of the latter's profits does not necessarily or for that reason make the parties partners or joint venturers. Conversely, the agreement to share profits is enforceable regardless of the fact that the parties may not be partners or joint venturers; and the promisee may maintain *an action at law* to recover his rightful share of the profits under the agreement.

*Nelson v. Abraham*, 29 Cal. 2d 745, 750-751, 177 P. 2d 931;

*Spier v. Lang*, 4 Cal. 2d 711, 716-717, 53 P. 2d 138;

*Bishop v. Kelley*, 100 Cal. App. 2d 775, 782-783, 224 P. 2d 814;

*Champagne v. Passons*, 95 Cal. App. 15, 29, 272 Pac. 353.

*"The fact that the complaint is drawn on the theory that the parol agreement between the parties contemplated only a partnership does not prevent the granting of the relief on some other theory based on the facts in evidence. . . .*

"It is, however, unnecessary to place a precise legal designation on the relationship between the parties. . . . The oral agreement and the conduct of the parties . . . define their respective rights, liabilities and duties one to the other *without the necessity for designating their relationship by a particular label."* (*Nelson v. Abraham*, 29 Cal. 2d 745, 749, 750, 177 P. 2d 931 (emphasis added).)

That the promisee under such an agreement may properly enforce his rights to a share of the profits *in an action at law,* notwithstanding that an accounting must be had to ascertain the sums due him, similarly does not rest in doubt. Thus, in *Bishop v. Kelley,* 100 Cal. App. 2d 775, 783, 224 P. 2d 814, the court, in dealing with precisely that question, stated:

> "Thus, when such profits were earned by the completion of a job, an amount of money measured by these profits should have been ascertained and such sum would then have been payable to respondent as a money demand. *For this sum he had a cause of action in debt, and the findings as made place his action on that basis.* Hence he was properly entitled to an account. (*Nelson v. Abraham,* 29 Cal. 2d 745, 751, 752 [177 P. 2d 931].)" (Emphasis added.)

It follows that, having pleaded the essential elements of a contract to share profits, his performance thereof, and the breach by defendants, plaintiff was entitled to maintain an action at law for his damages sustained thereby, being entitled to a jury trial thereon; and in such action to have the amount of his damages ascertained by an accounting of defendants' profits.

*Ex parte Peterson,* 253 U. S. 300, 306-308;

*McNair v. Burt* (5 Cir.), 68 F. 2d 814, 815;

*Mounger v. Wells* (5 Cir.), 23 F. 2d 374, 375;

*United States v. Sinclair Prairie Oil Co.* (N. D. Okla.), 21 F. Supp. 179, 180-181;

*Bercovici v. Chaplin* (S. D. N. Y.), 3 F. R. D. 409, 410;

5 Moore's Federal Practice, Sec. 38.25, pp. 201-202.

2. A Prayer for an Accounting, Even as the Major or Exclusive Item of Relief Sought, Does Not Make the Action Either Exclusively Equitable or Exclusively Legal, Since Both Law and Equity Have Jurisdiction Over Accounting Actions; and the Right to a Jury Trial Must Be Determined by Reference to the Factual Issues From Which the Right to an Accounting Is Alleged to Arise.

Nor was the nature of the issues or of the action altered by the prayer or the necessity for an accounting of defendants' profits in order to determine the amount of such profits to which plaintiff was entitled under the agreement alleged.

It does not aid defendants to label this action, as they did in the District Court [R. 47-49], as an "accounting action," since "accounting actions" are neither exclusively legal nor exclusively equitable; but are rather within the concurrent jurisdiction of law and equity.

*H. B. Zachry Co. v. Terry* (5 Cir.), 195 F. 2d 185, 189;

*McNair v. Burt* (5 Cir.), 68 F. 2d 814, 815.

See also, in accord with the foregoing authorities:

*McPherson v. Great Western Milling Co.,* 45 Cal. App. 91, 93-94, 187 Pac. 80;

*Moore v. Coyne & Delaney Mfg. Co.,* 98 N. Y. Supp. 892, 894;

*Ehrlich v. Jack Mills, Inc.,* 213 N. Y. Supp. 395, 398.

Actually, the origin of jurisdiction to compel an accounting was at common law, in the action at law of account render. The action was invoked wherever under

the facts a legal duty was alleged to exist in the defendant to pay money to plaintiff, but wherein the amount thereof could be ascertained only by an accounting of the transactions from which the duty allegedly arose. In such cases, jurisdiction was held to be at law, in the common-law courts, and the parties were entitled to a jury trial upon the issue of the existence of the duty to pay and to account.

*Yakus v. United States,* 321 U. S. 414, 447.

The procedure in such action required the determination, first, by the jury whether defendant had a duty to account; whereupon, if it found such a duty, an interlocutory judgment for an accounting was entered. Thereupon, the accounting phase proceeded before an auditor and, if money were then found due to plaintiff, a judgment in his favor therefor was entered.[3] Subsequently, the right to an accounting at law was preserved through the legal action of debt or assumpsit, and the right to a jury trial thereon preserved.

*Bishop v. Kelley,* 100 Cal. App. 2d 775, 783, 224 P. 2d 814;

5 Moore's Federal Practice, Sec. 38.25, pp. 198-199.

Subsequently, courts of equity began to order an accounting in cases wherein the duty to account was itself a creature of equity—as in bankruptcy, creditor's bills, and the like—or in cases where, by reason of the complicated nature of the accounts, plaintiff's legal remedy was inadequate. In the first group of cases, equity jurisdiction

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[3]Compare the Order for separate trials in the case at bar wherein precisely this procedure was prescribed and followed, but a jury trial denied.

was exclusive; while in the latter group, it was merely concurrent with jurisdiction at law.

5 Moore's Federal Practice, *supra,* p. 199;

*McNair v. Burt* (5 Cir.), 68 F. 2d 814, 815;

*H. B. Zachry Co. v. Terry* (5 Cir.), 195 F. 2d 185, 189.

It follows, then, that the labelling of an action as an "accounting action" does not, *ipso facto,* render it necessarily legal or necessarily equitable. It may be either or it may be both; and the nature of the action is determined, not by the prayer for an accounting, but by the nature and origin of the rights for the enforcement of which the accounting must be had. Where the rights sought to be asserted are legal in origin the action is one at law (or at most, one of concurrent jurisdiction), notwithstanding the prayer for an accounting; and the parties are entitled to a jury trial.

*Mounger v. Wells* (5 Cir.), 23 F. 2d 374, 375;

*Universal Rim Co. v. General Motors Corp.* (6 Cir.), 31 F. 2d 969, 970;

*U.S.S.B.M.F. Corp. v. U. S. Fid. & Guar. Co.* C. A. D. C.), 77 F. 2d 370, 372;

*McNair v. Burt* (5 Cir.), 68 F. 2d 814, 815;

*Bercovici v. Chaplin* (S. D. N. Y.), 3 F. R. D. 409, 410;

*United States v. Sinclair Prairie Oil Co.* (N. D. Okla.), 21 Fed. Supp. 179, 180-181.

That the rights sought to be enforced in the case at bar had their origin at law and are normally enforceable in an action at law does not rest in doubt. Stripped to its essentials, plaintiff's complaint alleged the existence

of certain rights arising out of a contract, his performance thereof, and defendants' breach, entitling him to damages computed by reference to the terms of the contract. In its truest sense, plaintiff's action was, as the complaint was titled, "For Breach of Contract." [R. 3.] The action differed from any other action at law for damages for breach of contract only in the irrelevant respect that defendants were required to account for their profits in order that the contractual measure of damages might be ascertained. The issues presented were *legal* in nature and the action, even with its accounting features, was by nature an action at law prior to the adoption of the Federal Rules. The necessary result is that, on the issues thus presented, plaintiff was entitled to a jury trial as a matter of right.

*Squarely on point in this respect is the decision of District Judge Rifkind* of the Southern District of New York, in *Bercovici v. Chaplin* (S. D. N. Y.), 3 F. R. D. 409. In denying a motion to strike plaintiff's demand for jury trial in an action on a contract by which defendant had agreed to pay plaintiff a percentage of his receipts from the exhibition of a motion picture, Judge Rifkind stated:

> "The first count alleges that plaintiff and defendant entered into an agreement to collaborate in the production of a series of motion pictures and that, for plaintiff's contribution, defendant agreed to pay him 15% of the gross receipts of each motion picture and to give him screen credit as co-author; that plaintiff duly performed; that defendant repudiated the agreement; that he produced a screen play entitled 'The Great Dictator,' based upon plaintiff's satire, but denied him screen credit and has refused to pay him the stipulated share of the receipts. The claim

alleged is for damages for breach of contract. *Such a claim is cognizable at law and plaintiff is entitled to have the issues tried to a jury. That the damages are measurable by receipts does not convert the claim into an equitable one.* Nor does the calling of the agreement a collaboration have that effect. *Even actions between partners may, in proper circumstances, be entertained at law.* . . .

"The practical difficulties of trying the issue of receipts to a jury can be largely overcome by recourse to Rule 53, which has adopted the practice approved in *Ex Parte Peterson,* 253 U. S. 300. . . ." (3 F. R. D. at 410. Emphasis added.)

To the same effect are the following cases, holding that an action upon a contract, wherein an accounting is necessary to ascertain the amount which may be owed to plaintiff, is an action at law, as to which plaintiff is entitled to a jury trial; and that the accounting features of the case may be determined by reference to a master or auditor:

*Mounger v. Wells, supra,* 23 F. 2d at 375;

*Universal Rim Co. v. General Motors Corp., supra,* 31 F. 2d at 970;

*United States v. Sinclair Prairie Oil Co., supra,* 21 Fed. Supp. at 179-180;

See also:

*United States v. Bitter Root Development Co.,* 200 U. S. 451, 478-479.

The decision of this Court in *Johnson v. Gardner* (9 Cir.), 179 F. 2d 114, is not to the contrary. That was an action by a trustee in bankruptcy to avoid certain fraudulent conveyances by the bankrupt, and to compel

an accounting by the transferee, as trustee *ex maleficio,* of the rents derived from the property. Wholly apart from the question of accounting, the rights asserted by the trustee were cognizable, and the wrongs alleged were remediable, only in equity, and this Court specifically so held. (179 F. 2d at 117.) This, then, was not a case in which a prayer for an accounting made the action equitable in nature, but was rather one in which *the entire cause,* with reference to the origin of the rights asserted and the remedy of the wrongs alleged, was solely in equity, regardless of the prayer for an accounting, which was itself merely an incident of the vindication of an equitable right. That is a far cry from the case at bar, where the rights asserted are *legal* in character and the accounting is sought solely as an aid to their enforcement.

**B. Whatever Equitable Flavor the Prayer for an Accounting May Have Imparted to the Action Below, That Feature Was Removed by the Order for Separate Trial Which Left, Upon the Phase of the Cause Actually Tried Below, Only Legal Issues.**

But even if it be assumed that plaintiff's prayer for an accounting *did* inject an equitable issue into the cause (notwithstanding the plethora of cited authority to the contrary), that issue was removed from the issues actually tried, and with it was removed any remote justification for the denial of a jury trial, by the Order of the court below for a separate trial. By its Order, as we have seen, the court below limited the issues to be tried, and the trial was actually so limited, to the issues of existence, terms, performance and breach of the agreement alleged in the complaint. It specifically postponed for a later and separate trial all issues relating to the accounting between the parties or damages, *and underscored the*

*separation thus achieved by similarly excluding these latter issues from the pre-trial discovery procedure!* [R. 56-57.]

That Order effectively blocked out of the issues to be tried all issues of equitable cognizance. It left for trial only those issues which are historically legal in nature, indistinguishable from the same issues presented in every action at law for breach of contract! If the prayer for an accounting presented equitable issues in the present case, *those issues were not included in the issues actually tried or ordered for trial.* It is absurd to contend that "equitable issues" presented by a complaint nullify a demand for a jury trial when those very issues have been, by court order, sifted out from the matters to be tried.

In point of fact, it is a recognized and accepted rule of procedure to utilize the device of separate trials under Rule 42(b) of the Federal Rules of Civil Procedure to separate legal issues from equitable issues, for the very purpose of permitting a jury trial upon the former, and a trial by the court upon the latter. Where this has been done, it is well settled that the parties are entitled to a jury trial of the legal issues, regardless of what might otherwise have been the result had the issues not been so separated.

*United States v. Yellow Cab Co.*, 340 U. S. 543, 555-556;

*Keene v. Hale Halsell Co.* (5 Cir.), 118 F. 2d 332, 335 (in an action to establish a debt and pursue property into the hands of a fraudulent transferee of the debtor, held that the parties were entitled to a separate trial by jury as to the existence of the debt, followed by a court trial of the allegedly fraudulent conveyance);

*Bowie v. Sorrell* (4 Cir.), 209 F. 2d 49, 51;

*Smith, Kline & French v. International Pharmaceutical Labs.* (E. D. N. Y.), 98 F. Supp. 899, 901;

5 Moore's Federal Practice, Sec. 42.03, pp. 1211-1214.

It is fundamental that whether a party is entitled to a trial by jury upon seasonable demand is dependent upon the nature of the issues actually to be tried. Where, as here, all issues relating to prayers for what might be equitable relief have been postponed for a later trial under Rule 42(b), the issues remaining being only factual and legal, it follows that it is error to deny a jury trial upon those issues.

The Order for separate trials similarly provides its own answer to any suggestion that the possibly complicated and detailed nature of the required accounting herein justifies the submission thereof to the court sitting without a jury. (*Cf. H. B. Zachry Co. v. Terry* (5 Cir.), 195 F. 2d 185, 189.) To the extent that such complicated and detailed nature would make *the accounting phase of the case* one for trial by the court, that could have been here accomplished without depriving plaintiff of a jury trial upon the issues of defendants' legal *duty to account.*

In the case at bar, the trial below was expressly limited to issues which were, in effect, issues relating to liability, from which the accounting question was expressly excluded. The trial which was ordered below and which was actually had was not in any respect concerned with the accounting feature of the case. If the required accounting was prospectively too complicated to submit to a jury, that fact could not and should not have permitted a denial of a jury as to a trial from which this pre-

sumptively complicated accounting was expressly excluded by the Order for separate trial!

There is ample authority for the proposition that a seasonably demanded jury trial must be accorded the parties upon the question of defendant's duty to account, after which the actual accounting may be had before a master or before the court without a jury.

*Bercovici v. Chaplin, supra,* 3 F. R. D. at 410;

*Mounger v. Wells, supra,* 23 F. 2d at 375;

*United States v. Sinclair Prairie Oil Co., supra,* 21 Fed. Supp. at 180-181;

*Bruckman v. Hollzer* (9 Cir.), 152 F. 2d 730, 733.

Having in fact so separated the issues in the case at bar, the trial court necessarily erred in denying a jury trial as to issues from which all questions of equitable cognizance had been separated. Upon the issues actually tried, plaintiff was entitled to and was erroneously denied a jury trial.

**C. The Erroneous Denial of a Jury Trial Is Always Prejudicial in Any Case in Which the Evidence Adduced by the Party Erroneously Denied a Jury Trial Was Sufficient to Support a Jury Verdict in His Favor Upon the Matters at Issue. Here the Evidence Was Clearly so Sufficient.**

It remains, then, only to determine whether the error in striking plaintiff's demand for jury trial was prejudicial and reversible. Clearly, it was. As we have observed from our purposely brief summary of the issues and evidence at the trial herein (Statement of the Case, B, *supra*), the crucial issues upon which this case turned were essentially factual, requiring a resolution of the rela-

tive credibility of plaintiff and defendant Gunzburg, the only persons present at the conversations at which the contractual obligation sued upon was created. There can be little doubt that plaintiff's testimony, if believed, was amply sufficient to establish a contract to pay to him 50% of Gunzburg's profits from the three-dimension business enterprise. Additionally, plaintiff's testimony was strongly buttressed by testimony given by a substantial number of wholly independent witnesses, of admissions by Gunzburg of a most positive character that plaintiff was Gunzburg's "partner" and the owner of "a part of the business" and of "a large share of the stock" of the company. (Statement of the Case, B, 8, *supra.*)

The testimony of plaintiff, supported by the testimony of these independent witnesses, was further reinforced by a plethora of documentary evidence which Gunzburg could not deny, since those documents were actually written by him or the writing thereof supervised by him and the documents published pursuant to his directions. These documents, consisting of press releases, letters to plaintiff and other persons in the industry, and proposals and presentations to others, contained a wide variety of statements by Gunzburg concerning plaintiff's role and participation in the business enterprise and discussions between the parties of an enormous number of different subjects relating to all phases of their joint enterprise. (Statement of the Case, B, 9, *supra.*) These statements and discussions furnished a clear, if not compelling, basis for the inference that the relationship of the parties was that of the close, jointly participating nature described by plaintiff, and not that of the loose, uncertain and indefinitely contingent variety described by Gunzburg. And, finally, plaintiff's wide-ranging activities in connection

with all phases of the business, including his close consultation with Gunzburg upon the most important operations of the enterprise, spoke eloquently of the relationship which plaintiff claimed that the parties had formulated. (Statement of the Case, B, 4, *supra.*)

That the aggregate of all of this oral and documentary evidence, viewed for its weight and sufficiency, would have furnished ample and abundant support for a verdict that plaintiff was entitled by contract to 50% of Gunzburg's profits, cannot seriously be questioned. Of course, all of that testimony might have been disbelieved and discounted as, apparently, it was disbelieved and discounted by the trial court, but that is not the point here. That the evidence adduced by defendants (which we have not summarized here for the reason that it is beside the point on this issue) furnished support for Gunzburg's version of the oral agreement we readily concede for the purpose of this argument; but that, too, is not the point here. If believed, *and plaintiff was entitled to have its credibility assessed in the mode of trial chosen by him and guaranteed to him by the Constitution,* the evidence produced by plaintiff would have amply supported a jury verdict in his favor.

It necessarily follows, therefore, that since plaintiff was entitled to a jury trial here as a matter of right (Points A, B, *supra*), the denial of such a trial notwithstanding his timely demand therefor was prejudicial error, necessitating the reversal of the judgment below.

*Dickinson v. General Accident etc. Corp.* (9 Cir.), 147 F. 2d 396, 397;

*Leimer v. Woods* (8 Cir.), 196 F. 2d 828, 833-834, 836-837;

*Bowie v. Sorrell* (4 Cir.), 209 F. 2d 49, 51;

*Mounger v. Wells* (5 Cir.), 23 F. 2d 374.

Thus, in *Bowie v. Sorrell, supra,* where the plaintiff had been erroneously denied a jury trial on the issue of the validity of a release, the Court of Appeals for the Fourth Circuit, in reversing the judgment and remanding the cause for a new trial, stated:

> "We are not impressed by the statement in the brief for defendants: 'We do not see how Bowie was prejudiced in any way by a failure to submit the issue of the validity of the release to a jury.' The right to a jury trial in a federal court, in a proper case, is guaranteed by the 7th Amendment to the United States Constitution and has been sedulously guarded by a long line of judicial decisions . . . The case must, therefore, be remanded to the District Court with instructions to grant a jury trial on the question of the validity of the release."

See also:

*Jacob v. City of New York,* 315 U. S. 752.

It being clear, then, that the denial of plaintiff's demand for jury trial was error, that error was prejudicial and requires reversal of the judgment below.

## Conclusion.

In *Bruckman v. Hollzer* (9 Cir.), 152 F. 2d 730, 732-733, this Court declared its recognition of the purpose of the Federal Rules of Civil Procedure to protect and preserve the rights of the parties before the court to a jury trial of the issues of fact properly triable by a jury, while at the same time encouraging the joinder in a single action of all claims to relief, both legal and equitable; thus averting the piecemeal adjudication of their rights and duties

in separate legal and equitable actions. In that connection, the Court stated:

> "The rules introduce the radical change in the federal practice of creating the jurisdiction in the District Courts to hear and determine in a single suit equity claims, with a claim which theretofore could have a common law adjudication in a separate suit. We take it that it is to 'preserve' in the suit provided by the rules the common law adjudication by jury trial existing in a separate suit when such a claim is joined with equitable claims having a common issue of fact, that Rule 38(a) provides: '(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.'
>
> ". . . We regard the rules enlarging the powers of the single tribunal to hear and determine equitable and legal transactions in which the pre-existing right to jury trial is to be preserved, as a long forward step in our judicial procedure. We consider one of its major purposes is to remove the expensive and time-losing requirement of two separate units to give to the litigant his jury as well as his equitable relief. We are not in accord with the extreme judicial conservatism which instinctively clings to outmoded intricate processes and would seek to nullify or minimize every attempt for their simplification."

Whatever prejudice, confusion or difficulty might be engendered by the joint resolution of legal issues by a jury and equitable issues by the Court, this Court stated, could be alleviated under Rule 42(b) by ordering separate trials, first of the legal issues and thereafter of the equi-

table issues. (*Bruckman v. Hollzer* (9 Cir.), 152 F. 2d 730, 733.)

That is precisely what the trial court did here. It ordered separate trials, first, of the legal issues of the making, terms, performance and breach of the contract alleged; and second, of the accounting for profits, and dissolution and division of assets. Having so separated the issues, it was consonant neither with the spirit and purpose of the Federal Rules, as defined and declared by this Court, nor with the Constitutional guaranty of trial by jury for the Court below to deny to plaintiff a jury trial upon the exclusively legal issues it had thus ordered to be separately tried.

Since the evidence below would clearly have sustained a verdict in plaintiff's favor upon the issues tried, the erroneous action of the trial court was necessarily prejudicial and requires reversal of the judgment from which this appeal has been taken.

Respectfully submitted,

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